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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FLORIDA ECONOMIC ADVISORY COUNCIL, *Petitioner*,

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS COASTAL TRANSMISSION CORPORATION AND HOUSTON TEXAS GAS AND OIL CORPORATION IN OPPOSITION

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OPINIONS BELOW

Opinion No. 301 and accompanying Order of the Federal Power Commission (Pet. App. 21a-68a) are reported at 16 F.P.C. 118. Opinion of the Court of Appeals (Pet. App. 1a-20a) is reported at 251 F. 2d 643.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1957 (Pet. App. 1a). Petitions for

rehearing and for rehearing *en banc* timely filed were denied on January 9, 1958. The petition for a writ of certiorari was filed on April 9, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

The issue presented by the petition in this case is whether this Court should grant certiorari to review questions which neither present any question of great public importance nor establish any conflict between the Court below and this Court or any other Court of Appeals, as follows:

1. Whether the Court below erred in finding that the findings of fact upon which the Commission relied to omit the intermediate decision were supported by substantial evidence and in concluding that the omission of the intermediate decision by the Commission upon such facts was not an abuse of discretion.

2. Whether the Court below erred in finding that the Commission, in reaching its decision, had sufficiently considered the record "to satisfy itself as to its findings and conclusions."

3. Whether the Court below erred in finding that the issuance by the Commission of these certificates of public convenience and necessity with conditions attached thereto was based upon substantial evidence in the record in this case and that such conditions were reasonable.

4. Whether the Court below erred in holding that the Commission, in reaching its ultimate determination of the requirements of the public convenience

and necessity in a certificate proceeding, was not required to make a decision as to whether or not the Federal anti-trust and unfair competition statutes were violated, consideration by the Commission of the evidence relied upon not being questioned by Petitioner.

STATUTES INVOLVED

Sections 7(c) and (e) of the Natural Gas Act (56 Stat. 83, 84, 15 U.S.C. 717f(c), (e)) and Sections 7(c), (d) and 8(a), (b) of the Administrative Procedure Act (60 Stat. 241, 242, 5 U.S.C. 1006, 1007) are set forth in Appendix E to the petition, pp. 97a-98a; Section 19(b) of the Natural Gas Act and Section 10(e) of the Administrative Procedure Act are set forth in Appendix A hereto, *infra*, pp. 1a.

STATEMENT OF THE CASE

This litigation follows issuance by Respondent, Federal Power Commission (Commission), of certificates of public convenience and necessity to Respondents, Coastal Transmission Corporation (Coastal) and Houston Texas Gas and Oil Corporation (Houston), authorizing Coastal and Houston to construct and operate a pipeline extending from Texas to Florida. The project will provide natural gas service throughout Florida for the first time (Pet. App. 2a n).[1]

Houston and Coastal filed interdependent applications[2] with the Commission for certificates to con-

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[1] References to "Pet." and to "Pet. App." are to Petitioner's Brief and the Appendix thereto, respectively; to "R." are to Joint Appendix printed for the use of the Court below; to "App." are to Appendix to this Brief.

[2] Pursuant to Sections 7(c) and (e), Natural Gas Act, as amended.

struct and operate facilities to transport and sell natural gas (resale gas) and to transport natural gas (transportation gas) from the fields of production in Texas and Louisiana into the State of Florida.

Hearings commenced on July 9, 1956. Numerous municipalities, gas distribution systems, industries, chambers of commerce and two official agencies of the State, the Florida Railroad and Public Utilities Commission and the Florida Development Commission (Florida Commissions), intervened (R. 397, *et seq.*) in support of the project. Several competing fuel interests, including Petitioner, opposed the issuance of the certificates (R. 397, *et seq.*). With various recesses, the hearings were concluded on November 28, 1956.

As applied for and certificated, the project will have approximately 1,500 miles of main line and approximately 1,000 miles of lateral lines, and, with attendant facilities, is estimated to cost approximately $150,000,000 (Pet. App. 23a-24a). Coastal will purchase from producers all of the resale gas for the project and will transport it through its facilities for delivery and sale to Houston at a point near Baton Rouge, Louisiana. Houston will transport such gas through its facilities for sale and delivery to a number of retail gas distribution systems and direct industrial customers throughout Florida. Approximately 40% (100,000 Mcf per day) of the volume to be carried initially in the pipeline (250,000 Mcf per day)[1] will be resale gas. The remainder of the gas to be transported is gas which will be purchased by two Florida public utilities (Power Companies) for their own use

[1] The pipeline is designed to transport a daily volume of 400,000 Mcf of gas by addition of more compressor facilities (Pet. App. 40a).

and consumption directly from producers in Texas and Louisiana and transported to Florida by Coastal and Houston (Pet. App. 25a).

As a result of the hearings, and after briefs were submitted and oral argument had, the Commission, on December 28, 1956, issued certificates with conditions attached thereto to Coastal and Houston, authorizing them to construct and operate the facilities as proposed (Pet. App. 21a, *et seq.*). Following the denial of its petition for rehearing, Petitioner, which was organized for the purpose (among others) of resisting the introduction of natural gas into Florida (Pet. App. 2a n), appealed to the United States Court of Appeals for the District of Columbia Circuit (R. 1, *et seq.*), which Court affirmed the action of the Commission (Pet. App. 1a, *et seq.*). Petition for rehearing filed by Petitioner was denied by both the panel which heard the case and the Court *en banc*. (App. 2a, 3a).

Such additional facts as are necessary to particular Sections of this brief will be set forth therein.

REASONS WRIT SHOULD NOT BE GRANTED

There is no question raised which warrants this Court's attention. No holding of the Court below involves: (1) a question of great public importance which this Court should decide because the holdings made below will have widespread application; (2) a conflict with any decision of this Court; or (3) a conflict with any decision of another Circuit.

The issues presented are purely ones as to the propriety of the Commission's actions in the light of the facts in this particular case. Petitioner has already been accorded a full hearing as to its complaints by the Court of Appeals which affirmed the actions of the

Commission. Moreover, Petitioner fails to show that any of the holdings complained of are wrong.

I. THE OMISSION OF THE INTERMEDIATE DECISION

During the hearing,[1] Coastal, by motion concurred in by Houston, Commission Staff Counsel, and all supporting intervenors then present, requested that, upon conclusion of the hearing, the intermediate decision procedure be omitted.[2] (R. 68k, *et seq.*). Petitioner and other intervenors representing competing fuel interests opposed the motion (R. 73-77).

The evidence showed that Coastal's contracts for its entire gas supply were subject to cancellation or automatic termination unless Coastal received a certificate by December 31, 1956; that Coastal had laboriously assembled this gas supply over a period of nearly three years on terms which were favorable to the people of Florida and which could not be duplicated; and that if the contracts were terminated, the entire project might fail.[3]

On December 6, 1956, the Commission issued an order finding (1) that the contracts were subject to cancellation on the grounds aforesaid, (2) that the concern of the public in Florida in obtaining natural gas for the State was "of paramount interest", and

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[1] On November 14, 1956. The hearing was concluded on November 28, 1956.

[2] As provided by Section 8(a), Administrative Procedure Act, 5 U.S.C. § 1007(a), and Section 1.30(c) of the Commission's Rules, 18 C.F.R. 1.30(c).

[3] There were 47 contracts in the record, covering 824 billion cubic feet of gas to be sold by 33 producers (Pet. App. 28a-29a). The contracts with one supplier, covering over 28% of the total reserve (R. 205-208, 290), provided for automatic termination. (R. 195, *et seq.*). The uncontradicted testimony in the record is that the gas supply of Coastal could not be reassembled at the same prices (R. 68k).

(3) that unless the intermediate decision were omitted a decision by the Commission could not be rendered before December 31. It thus concluded:

> "Upon the basis of the entire record, due and timely execution of its functions imperatively and unavoidably requires that the Commission omit the intermediate decision procedure and render final decision in the proceedings." (R. 411, *et seq.*)

The Court below found there was substantial evidence to support the Commission's findings, and held that the Commission's action in omitting the decision was not an abuse of discretion (Pet. App. 7a-8a).

Petitioner's complaint raises no question of law; it simply objects to the conclusions reached by the Court below from the evidence in the record. There is no question, therefore, of Federal law of great public importance presented. Petitioner is merely asking this Court to review the record made before the Commission, to substitute its evaluation of the facts therein for that of the Commission and the Court below, and to reach different conclusions.

Both the Administrative Procedure Act[1] and the Commission's Rules of Practice and Procedure[2] provide that in an initial licensing proceeding the Commission may omit the intermediate decision and render its decision in the first instance if it finds on the record that due and timely execution of its functions imperatively and unavoidably so requires. The Commission in this case so found. (R. 411, *et seq.*).

Section 19(b) of the Natural Gas Act provides:

> "* * * The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." (App. 1a)

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[1] Section 8(a).

[2] Section 1.30(c)(2).

Section 10 of the Administrative Procedure Act is to the same effect (App. 1a).

The Court below, on review of the record, found:

> "There was substantial evidence to support this finding. The Commission's holding that this circumstance warranted omission of the intermediate decision was not an abuse of discretion." (Pet. App. 7a-8a.)

The disagreement of the dissenting judge resulted from a different evaluation of the facts—not from a different interpretation of the applicable law (Pet. App. 13a).

This case involved an application for an initial license. In examining the record to determine whether there was substantial evidence to support the findings of the Commission and in determining whether, upon those facts, the Commission abused its discretion, the Court below did all it was required to do. Its action is in accord with *RCA Communications, Inc.* v. *Federal Communications Commission*, 99 U.S. App. D.C. 163, 238 F.2d 24 (1956); *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 209 F.2d 717 (C.A. 10, 1953); *Alabama-Tennessee Natural Gas Company* v. *Federal Power Commission*, 203 F. 2d 494 (C.A. 3, 1953); and *Kenney, et al.* v. *United States, et al.*, 103 F. Supp. 971 (D.C., D.N.J., 1952).

II. CONSIDERATION OF THE RECORD BY THE COMMISSION IN MAKING ITS DECISION.

The Examiner certified the motion for omission of the intermediate decision to the Commission on November 16, 1956 (R. 410), and certified the entire record on November 28, 1956. Briefs were submitted to the Commission, as follows: Coastal and Houston on December 5, Staff Counsel on December 10, Peti-

tioner and other intervenors on December 17, reply briefs by Coastal and Houston on December 20 (Pet. App. 8a). Oral argument was held before the full Commission on December 21, in which all parties who desired to appear were heard, including Petitioner (R. 421-422). The Opinion and Order granting certificates were issued on December 28, 1956. The majority opinion, including formal findings and conclusions, consisted of 31 pages; the minority opinion, 5 (R. 21a, *et seq.*).

In its petition for rehearing of the Order granting certificates, Petitioner claimed that it was a "physical impossibility" for the Commission to have considered and appraised the record before making its decision (R. 539), but submitted no affidavit or made any other showing that the Commission had not, in fact, considered and appraised the record. In denying that petition, the Commission said:

> "* * * There is no need to detail the special actions taken in this case to insure that, consistent with a proper consideration of the case, as prompt a decision as possible be reached. It is sufficient that we are satisfied that this case received consideration as full and careful as it would if dealt with on a routine basis." (Pet. App. 82a-83a)

The Court below found no merit in Petitioner's contention, finding, instead, that the Commission had considered and appraised the record (Pet. App. 8a-9a).

Petitioner claims that the holding of the Court on this point is a violation of the principle of *Morgan* v. *United States*, 298 U.S. 468 (1936). Petitioner does not argue that the Commission did not hear the oral argument or that the briefs submitted were not read by the Commission. It argues that it was

"arithmetically impossible" for the Commission to have read page-by-page and to have appraised the entire record in the period from the conclusion of the hearing to the date of decision. Petitioner concludes that the Court's failure to reverse on this ground is a holding "In effect * * * that it will not review a claim that he who decided did not hear so long as he who decided says that he heard" (Pet. 22), which holding, it says, violates the principle of the *Morgan* case.

The Court below did not so hold. It held that:

> "The time spent considering the evidence cannot be held by us to be too little if it appears that the Commission has spent the time required to satisfy itself as to its findings and conclusions." (Pet. App. 9a).

It then found that the Commission had given sufficiently "close scrutiny" to the record "to satisfy itself as to its findings and conclusions."[1]

The dissent was based upon mathematical computations from which it concluded that it was an "arithmetic impossibility" for the Commission to have read the record in its entirety (Pet. App. 15a-16a).[2]

The opinion of the Court below does not conflict with either the principle or the holding of the *Morgan* case. Having determined that the Commission had scrutinized the record sufficiently closely to satisfy itself as to its findings and conclusions, there was nothing more required of the Court.

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[1] "The vigorous dissent by Commissioners Connole and Kline *serves to emphasize the close scrutiny given by the Commission.*" (Pet. App. 9a, emphasis supplied).

[2] Deciding officers need not *read* all of the record; they may depend upon assistance of subordinates in their *consideration* thereof. *Morgan* v. *United States*, *supra*; *Cupples Company Manufacturers* v. *NLRB*, 103 F. 2d 953 (C.C.A. 8, 1939).

Moreover, as there was no affidavit or other showing that the Commission had not in fact considered the record and in view of the Commission's statement that it had given full and careful consideration to this matter, the Court went further than it was required by law. A number of cases have held that recitations of regularity made by administrative agencies cannot be challenged by mere allegation that the agency failed to consider the entire record: *NLRB* v. *Biles-Coleman Lumber Co.*, 98 F. 2d 16 (C.C.A. 9, 1938); *Cupples Company Manufacturers* v. *NLRB*, 103 F. 2d 953 (C.C.A. 8, 1939); *Inland Steel Co.* v. *NLRB*, 105 F. 2d 246 (C.C.A. 7, 1939); *NLRB* v. *Lane Cotton Mills Co.*, 108 F. 2d 568 (C.C.A. 5, 1940); *NLRB* v. *Ford Motor Company*, 118 F. 2d 766 (C.C.A. 9, 1941); *Twin City Milk Producers Association* v. *McNutt*, 122 F. 2d 564 (C.C.A. 8, 1941); and *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676 (C.A. 9, 1949).

III. ISSUANCE OF CERTIFICATES WITH CONDITIONS.

Petitioner argues that on the basis of the evidence in the record at the conclusion of the hearing, the Commission could not certificate the project (Pet. 24), and that the only action permissible for the Commission was to reopen the record to permit "* * * Applicants to introduce evidence to show that they could in fact 'overcome the deficiencies' * * *." (Pet. 25). It further argues that, having erred in issuing certificates with conditions, the Commission compounded this error by finding compliance with those conditions without having held public hearings thereon (Pet. 28-29).

Both arguments are without merit, and neither presents a question of great public importance. They

raise only questions as to the sufficiency of the evidence to support the issuance of the certificates with these conditions, questions already decided adversely to Petitioner, as is shown below.

Section 7(c) of the Act provides that a hearing shall be held on applications for certificates of public convenience and necessity. Section 7(e) sets forth the prerequisites for issuance of certificates and empowers the Commission to attach to certificates issued reasonable terms and conditions.

At the hearing, Coastal, Houston and numerous supporting intervenors introduced voluminous evidence to establish the basic elements for issuance of certificates. Petitioner and others, however, attacked the transportation rates as not being based solely upon traditional cost-of-service methods and allocation practices of the Commission (R. 91-92, 113-114); argued that the public interest required elimination of the cancellation provisions in the transportation contracts (R. 91) and that equity capital of 15% be substituted instead of the 12% proposed in the finance plans (R. 63, 98k); and questioned the rate of return in Coastal's rate formula (R. 68a-68b) and its working capital allowance in the cost-of-service formula (R. 68h-68i). All features of the proposed project were subjected to examination by Petitioner and other paries at the hearing, and were fully briefed and orally argued to the Commission.

From the evidence in the record, the basic findings of fact necessary for the issuance of certificates were found by the Commission to have been established,[1] to wit: (1) the gas supply was adequate (Pet. App. 30a); (2) the markets were adequate (Pet. App.

[1] The existence in the record of the evidentiary facts recited in Opinion No. 301 from which the Commission made these basic findings is not questioned by Petitioner.

30a-31a); (3) the facilities were reasonable and feasible from the standpoint of cost and design (Pet. App. 34a-36a); (4) the project was economically feasible (Pet. App. 36a-37a, 38a); and (5) the project was financially feasible (Pet. App. 50a). Having made these basic findings and upon consideration of all the evidence in the hearing, the Commission made its ultimate findings of willingness and ability and of public convenience and necessity, and issued the certificates (Pet. App. 57a).

The Commission, in the exercise of its sound discretion and upon consideration of the evidence, attached certain rate and finance conditions to the certificates to correct the features of the proposal found defective by the Commission, thereby bringing them into conformity with the Act's standards (Pet. App. 40a, 79a), as it is expressly empowered to do under Section 7(e) of the Act.

The findings made by the Commission and its actions taken, including its decision to attach conditions, are based upon particular facts developed during the hearing in this case. They will not have widespread application. The Court below has re-evaluated these facts and has sustained the findings of the Commission. Petitioner would have this Court substitute its evaluation of the facts for those of the Commission and the Court below. The usual procedures followed by the Commission, including those respecting the attachment of conditions, were carefully adhered to by the Commission. For example, the attachment of conditions to a certificate to correct defects in proposed rate structures is common procedure.[8]

[8] In *Signal Oil & Gas Co.* v. *F.P.C.*, 238 F. 2d 771 (C.A. 3, 1956), the Court said: "We are advised that its (the Commission's) annual report to Congress for 1955 shows 38 certificate

The Court below, answering Petitioner's claim that there was no substantial evidence to support the Commission's decision that the proposal, as modified by conditions, was required by public convenience and necessity, held:

> "* * * we find in a voluminous record ample evidence supporting this conclusion. * * * It is true that the finding of public convenience and necessity was conditioned on certain deficiencies being corrected, but, as conditioned, the finding is supported by substantial evidence." (Pet. App. 4a)

It also sustained the power of the Commission to attach reasonable conditions (Pet. App. 5a) and found no error in the attachment of these particular conditions. It found that:

> "The conditions only resolved issues raised, argued and briefed in the hearing. They involved no surprises except insofar as they may have gone farther or not so far as petitioner would have wished." (Pet. App. 9a)

Finally, the Court held that the Petitioner had been heard on all important issues (Pet. App. 10a).

As the evidence at the hearing supported the issuance of the certificates and the attachment of rate and finance conditions thereto, the issuance of the certificates with conditions was proper. The hearing provided by Section 7(c), in which Petitioner was entitled to participate under Section 15 of the Act, was thereupon concluded. A further hearing for the purpose of determining whether applicants could comply with

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orders subject to rate filing conditions during that fiscal year: 1954, 52 certificates with rate conditions; 1953, 52 such conditions and so on for several prior years." (p. 774)

these conditions was not required, for all the prerequisites to the issuance of the certificates and the attachment of the conditions had been fulfilled. Nothing further was required to validate the certificates.

The Commission is not required to find that an applicant is able and willing to comply with rate and finance conditions before it can issue certificates with such conditions attached. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission.*[1] The same argument Petitioner makes here was also made in that case and was rejected. There, the Commission had found that the applicant's proposed rate schedules were unsatisfactory and that the applicant had not established a firm and definite plan of financing. Nevertheless, it issued certificates to which were attached conditions that required the applicant to submit satisfactory rate schedules within six months and to obtain approval of the Securities and Exchange Commission of any plan of financing before it was put into effect. The Court sustained the issuance of the certificate thus conditioned, since it found that the ultimate findings of the Commission were supported by substantial evidence:

> "The Commission found that Michigan-Wisconsin is 'able and willing properly to do the acts and to perform the service proposed.' This finding, like that of public convenience and necessity, is expressly required by Sec. 7(e) of the Act. We think it is also supported by substantial evidence. Panhandle says it is not supported by findings or proof of financial ability or a satisfactory rate schedule. The Act does not require such findings. The Commission did find, on sufficient evidence, that Michigan-Wisconsin 'has secured substantial

[1] 83 U.S. App. D.C. 297, 169 F. 2d 881 (1948); the argument here presented was made in the Petition for Writ of Certiorari filed therein, pp. 29-34. Certiorari was denied, 335 U.S. 854 (1948).

reserves of natural gas and has submitted reasonable proof of the financial and economic feasibility of its project.' Sec. 7(e) of the Act expressly authorizes the Commission to attach reasonable conditions 'to the issuance of the certificate and to the exercise of the rights granted thereunder.'" (p. 883)

It is clear that where there is substantial evidence to support the issuance of a certificate and the conditions are reasonable, the issuanc of a certificate with conditions is proper. A further hearing on the matter of compliance with those conditions is not required to validate the certificate.

Nevertheless, Petitioner continues to argue here that further public hearings on compliance were required to validate the certificates. At the time the certificates were issued, the Commission did not undertake to fix the exact rates of applicants. Petitioner argues that the fixing of what the exact rates of applicants would be was a *sine qua non* for certification.

This argument is also without merit, for it is based upon an erroneous assumption that the exact rates required by the public convenience and necessity were in issue at the hearing. As is clear from the Commission's opinion, the issue with respect to the rates proposed involved the method of arriving at the rates in question, to wit: whether Coastal and Houston would be permitted to depart from (as they proposed) or whether the public interest required that they utilize the Commission's traditional concept of rate-making which requires that rates be determined upon cost-of-service based on usual Commission allocation practices, as contended by Petitioner. The Commission resolved this issue in Petitioner's favor by requiring that rates be determined upon cost-of-service based upon usual Commission allocation practices. As stated, *supra*, p. 14, the Court below found that Peti-

tioner had been heard on all important issues and that the conditions only resolved issues raised, argued and briefed before the Commission.

Petitioner's reference to the complexities attendant upon the fixing of rates with its quotation of language of the Commission in *Atlantic Seaboard Corp., et al.*, 11 F.P.C. 43, does not support its claim that exact rates were in issue; rather, it serves to illustrate the reasons exact rates are not an issue in an initial certificate proceeding—the type of case here involved.

In holding that exact rates are not required to be established in an initial certificate proceeding, the Court in the *Panhandle* case[1] said:

> "The Act does not require, and because of changing costs it would be illusory to require, that rates be fixed before construction begins." (p. 883).

Petitioner's argument that the fixing of exact rates by the Commission was a *sine qua non* to the issuance of certificates is without basis in fact or in law.

The matter of compliance with conditions is wholly within the administrative powers and competence of the Commission. The fact of compliance could be determined by it from visual inspection of the transportation contracts, financing plans, and rate schedules, and from arithmetical computations as to cost allocation, based on facts in the record which were provided in part by Petitioner. Moreover, Petitioner has no standing to complain of the attachment of conditions. *Arkansas Louisiana Gas Company* v. *Federal Power Commission*, 113 F. 2d 281 (C.C.A. 5, 1940). *A fortiorori*, it should have no standing to complain of the matter of compliance with conditions nor to demand a hearing thereon. Furthermore, as a competing fuel interest, Petitioner has no proper interest in the

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[1] 169 F. 2d 881.

exact rates to be charged customers. *Alston Coal Co. v. Federal Power Commission*, 137 F. 2d 740 (C.C.A. 10, 1943). It would, simply by its bald assertion of an "exact rate" argument, have this Court convert this, an initial certificate proceeding, into a rate case.

IV. COMMISSION CONSIDERATION OF CHARGE OF UNFAIR COMPETITION; DECISION AS TO LEGAL CONSEQUENCES NOT REQUIRED.

Petitioner's claim of error before the Court of Appeals in regard to this point was "that the Commission *was bound to make findings* on Petitioner's allegation that the arrangement for the sale and transportation of gas for the Power Companies was violative of the public policy of the United States as expressed in the anti-trust laws." (Pet. 33, emphasis supplied) However, at the conclusion of the section, Petitioner argues: "We submit that the majority's holding that the Commission *properly failed to consider this issue is clearly wrong.*" (Pet. 36, emphasis supplied)

The Court below did not hold that the Commission "properly failed to *consider*" this matter (emphasis supplied). The holding of the Court below sustained the action of the Commission in not *deciding* whether the contractual arrangements did or did not constitute a violation of the anti-trust laws.

Petitioner has never claimed the Commission had not *considered* its claim or the evidence or arguments relied on in support thereof. Before the Commission, Petitioner claimed that the contracts by which the Power Companies purchased gas from their suppliers and by which Houston transported that gas constituted unfair competition. In its petition for rehearing, Petitioner claimed that the Commission "erred in *failing to find* [that such contractual arrangement] constitutes unfair competition * * *" (R. 537, emphasis supplied). Petitioner did not claim that the Commission had not *considered* its claim of unfair competition or the facts

and arguments with respect thereto in reaching its conclusion that the public convenience and necessity require that this project be certificated.

In its petition for review Petitioner urged "Respondents erred in *failing to find* that the arrangements among the power companies, their suppliers and Applicants * * * constitute unfair competition * * *." (R. 6) Again there was no claim that the Commission had not *considered* this matter.

The Opinion of the Commission shows on its face careful consideration of this matter. The Opinion of the Court below recognizes this, and sustains the action of the Commission in not making specific findings as to legal consequences of the particular facts under the anti-trust laws.[1] The issue presented to this Court is whether that holding is in conflict with any decision of this Court or any other Circuit.

Although Petitioner urges that review should be granted because the holding of the Court below is in conflict with the decisions of this Court, that holding is in complete harmony with the decisions of this Court. Neither case cited by Petitioner, *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) and *City of Pittsburgh* v. *Federal Power Commission*, 99 U.S. App. D.C. 113, 237 F. 2d 741 (1956), supports Petitioner's proposition; in fact, they are to the contrary.

They hold that an administrative agency is not bound to make a decision as to whether or not there has been a violation of the Federal anti-trust or unfair competition statutes, but that the agency, in matters of policy within the ambit of its powers, is required to consider facts presented

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[1] Compelling evidence that Petitioner's claim of unfair competition was considered is the attachment by the Commission of the condition requiring that the transportation rates be based on cost-of-service rather than on competitive fuel oil prices, as urged by Petitioner.

concerning purported violation of such statutes or any other broad Federal policies and weigh those facts with all the other facts in the case in reaching its ultimate determination of the requirements of the public convenience and necessity. Thus the very cases cited by Petitioner show conclusively that the holding of the Court below is correct.[1]

The settled and authoritative rule of law is that, unless the standards of the anti-trust laws are made a criterion in a particular regulatory act which the agency must apply in its determination of whether a particular proposal is required by the public convenience and necessity, a decision by the agency that there has or has not been a violation of the anti-trust laws is not required. In *McLean Trucking Co.* v. *United States, supra,* it is said:

> "To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies * * * with broad discretion and has charged them with the duty to execute stated and specific statutory policies. *Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act.* The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems." (p. 79, emphasis supplied)

The standards of the anti-trust laws have not been made a standard governing the issuance or denial of certificates under the Natural Gas Act. As they are not, a specific finding thereon is not necessary. *Na-*

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[1] To the same effect: *National Broadcasting Company* v. *United States,* 319 U.S. 190 (1943).

tional Coal Association v. *Federal Power Commission*, 89 U.S. App. D.C. 135, 191 F.2d 462 (1951); *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *Department of Conservation of State of Louisiana, et al.* v. *Federal Power Commission*, 148 F.2d 746 (C.C.A. 5, 1945); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F.2d 467 (C.A. 3, 1956).

Furthermore, after reviewing the evidence the Court below found:

> "While petitioner's business will no doubt be affected by the advent of natural gas, both petitioner and the pipeline companies can do business in Florida and both are needed to serve the growing population and expanding economy of Florida. The 'injury' to petitioner is that it must share what has heretofore amounted to a power monopoly. Moreover, the injury to petitioner is not likely to be substantial." (Pet. App. 10a)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ should be denied.

Respectfully submitted,

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May 6, 1958

APPENDIX A

STATUTES:

Section 15(a) of the Natural Gas Act:

> "(a) Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State Commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest." 52 Stat. 829, 15 U.S.C.A. 717n(a).

The material part of Section 19(b) of the Natural Gas Act is:

> "* * * The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 52 Stat. 831, 15 U.S.C.A. § 717r(b).

The material part of Section 10(e) of the Administrative Procedure Act is:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings and conclusions found to be * * * (5) unsupported by substantial evidence * * *." 60 Stat. 243, 5 U.S.C.A. § 1009(e).

REGULATIONS:

Section 1.30(c)(2):

> "(2) In rule-making or initial licensing proceedings the Commission, with or without request or motion therefor, may render the decision upon a finding on the record that due and timely execution of its functions imperatively and unavoidably so requires." 18 C.F.R. 130(c)(2).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1958

Nos. 13,833 and 13,952

FLORIDA ECONOMIC ADVISORY COUNCIL, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

Before: Bazelon, Fahy, and Burger, Circuit Judges in Chambers.

ORDER

Upon consideration of petitioner's petition for a rehearing before this division, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: January 9, 1958

Circuit Judge Bazelon dissents.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1958

Nos. 13,833 and 13,952

FLORIDA ECONOMIC ADVISORY COUNCIL, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of petitioner's petition for a rehearing en banc, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: January 9, 1958

Circuit Judge Bazelon dissents.